

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

NO. 76-4259

UNITED STATES COURT of APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

HENRY M. HALD HIGH SCHOOL ASSOCIATION,
and ROMAN CATHOLIC DIOCESE OF BROOKLYN,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

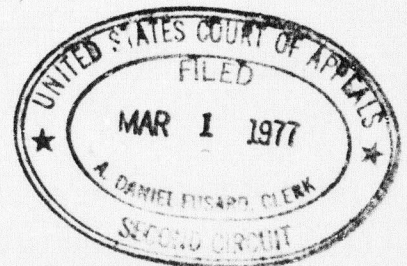
BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence on the record as a whole supports the Board's finding that Respondent violated Sections 8(a)(3) and (1) of the National Labor Relations Act by discharging employee Joseph Poole.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. §151 et seq.), for enforcement of its order issued on February 4, 1975, against Henry M. Hald High School Association and Roman Catholic Dicoese of Brooklyn. The Board's Decision and Order (A. 13-24, 29-30) ^{1/} was issued by a three-member panel of the Board consisting of Members Fanning, Jenkins, and Penello and is reported at 216 NLRB 480. This Court has jurisdiction over the proceedings, the unfair labor practices having occurred in Brooklyn, New York.

^{1/} Record references ("A.") are to pages of the joint abbreviated appendix; "Tr." references are to the stenographic transcript of the hearing before the Administrative Law Judge. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

I. THE BOARD'S FINDINGS OF FACT

A. Background

The Roman Catholic Diocese of Brooklyn through the Henry M. Hald High School Association ("Association") operates a number of private nonprofit senior high schools in Brooklyn and Queens, New York; ^{2/} among them is Christ the King High School (A. 14). The Lay Faculty Association, Local 1261, American Federation of Teachers, AFL-CIO ("Union"), represents all nonreligious teachers at these schools, including Joseph Poole who was employed at Christ the King and whose discharge is the subject of this case (A. 14, 17).

B. Poole's pre-discharge union activities

Poole was employed in the language department at Christ the King since the school opened in 1963; he became a member of the Union when it was formed in 1965 (A. 17; Tr. 15-16). In late September and early October 1973, after its wage agreement with the Association had expired, the Union engaged in a lawful strike in support of its wage demands. ^{3/} Poole participated in the strike, picketing at Bishop Reilly, another of the Association

^{2/} The Board found (A. 14), as it has in the past, that the Association and the Roman Catholic Diocese of Brooklyn are alter egos and the joint employers of the teachers in the Association schools. Henry M. Hald High School Association and Roman Catholic Diocese of Brooklyn, 216 NLRB 480 (1975); Henry M. Hald High School Association, Roman Catholic Diocese of Brooklyn and Sisters of Saint Joseph, 216 NLRB 512 (1975); Henry M. Hald High School Association, 213 NLRB 415 (1974). See also N.L.R.B. v. Roman Catholic Diocese of Brooklyn, 535 F. 2d 1387 1388 (C.A. 2, 1976).

^{3/} The Association's conduct in connection with negotiations preceding the strike was the subject of a separate unfair labor practice proceeding. Henry M. Hald High School Association, 213 NLRB 463 (1974), application for enforcement filed, No. 76-4258 (C.A. 2, Nov. 22, 1976).

schools, and trying to dissuade delivery men from bringing oil and supplies into the school (Tr. 17). His participation in the strike was common knowledge (A. 17, 20; Tr. 48).

In November, after the strike had been settled, Poole reported to Robert Gordon, then Union vice-president, that he had been assigned an inordinate number of substitutions (A. 17-18; Tr. 17, 42-43). Gordon in turn asked Principal Hugh Kirwan if he could compare teacher assignment records to verify Poole's complaint. Kirwan refused and Gordon filed a grievance seeking access to the records. (A. 17-18; Tr. 42-45.) The grievance was eventually settled in the Union's favor (Tr. 54-56), but not before Principal Kirwan had asked Poole to his office, mistakenly believing that the Union's grievance concerning the records was a grievance filed by Poole against him (A. 18; Tr. 18-21). Poole also had words with Sister Mary Brown, who assigned replacement duty, when he was assigned substitutions on Monday, Tuesday, and Wednesday of a particular week in January. While Sister Brown was explaining how she decided on replacements, Poole noticed another teacher's record on the desk. Although the teacher's class schedule was identical to Poole's, she had only half the number of replacement assignments. Poole asked Sister Brown if she thought it was fair that he had been assigned three replacements that week and the other teacher none. Sister Brown asked if Poole was saying that she was unfair. Poole replied "No, I just asked you if you thought it was unfair that I got three and she didn't have any this week" (A. 18; Tr. 29-30). With that the bell rang and Poole left for class (Tr. 30).

Sometime in November, Poole noticed that his department was holding three or more meetings a month that extended after hours (A. 18; Tr. 22). The collective agreement provided for only ten such meetings a year (A. 18; Tr. 22-23), and Poole realized that at the current rate the meetings would soon violate the contract. He reported this to Gordon by leaving a note on Gordon's desk (A. 18; Tr. 23, 45). Gordon passed the note on to the assistant principal (Tr. 45). Two weeks later, Sister Ann Gray, chairman of the language department, told Poole she had seen his note and was annoyed that he hadn't come to her directly rather than "running to Mr. Gordon" (A. 18-19; Tr. 27-28). Poole apologized, saying he had intended to talk to Sister Gray but had forgotten (A. 19; Tr. 28).

C. Poole's discharge

For economic reasons the school had to reduce its teaching staff by 20 for the 1974-75 school year (A. 19; Tr. 74-75). The reduction meant that one of the French teachers, Marian Tobon, Nicole Fabien, or Poole, had to be laid off (A. 19; Tr. 78-79, 140-42). Since the collective agreement required that teacher contracts for the ensuing year be tendered by April 15, Sister Gray, as head of the language department, had to make her recommendations sometime in March (A. 19; Tr. 78-79, 141). Sister Gray immediately eliminated Marian Tobon from consideration because she could teach both Spanish and French (A. 19; Tr. 93, 119-20, 142, 167). As between the two remaining teachers, Poole and Fabien, Sister Gray recommended that Poole be terminated (A. 19; Tr. 31, 141-42, 168-69, 175-76).

During the last week of March, Union Vice-President Gordon asked Sister Gray whether the school had selected anyone for termination. She answered that were the choice hers she would keep Fabien who was quiet and gave no trouble and terminate Poole who was constantly complaining, going to the Union, and filing grievances. Sister Gray said that Poole, like Gordon, was interested only in increased salaries and better working conditions and that they would all have to make a choice between the Union and the school (A. 19; Tr. 52-53).

At an administrative meeting held in late March and after a discussion of the relative merits of Poole and Fabien as teachers of French, Principal Kirwan accepted Sister Gray's recommendation to terminate Poole (A. 19; Tr. 31, 101-02, 105-07). Poole received notice of his termination on April 2; Gordon was informed the next day (A. 19-20; Tr. 30, 32-33, 45-46). On April 10 Gordon discussed several matters with Principal Kirwan, including Poole's termination (A. 20; Tr. 47-48, 83). When asked why Poole was terminated, Kirwan said Poole had been selected "because he was a pain in the neck, a constant complainer who was always running to the Union when he did not get his own way" (A. 20; Tr. 47-48). Kirwan specifically mentioned Poole's complaints concerning the assignment of replacement duty and excessive faculty meetings and noted that Poole's participation in the strike was well known (A. 20; Tr. 47).

Gordon tried to persuade Kirwan that Fabien rather than Poole should have been terminated (A. 20; Tr. 48-49). Fabien was qualified only to teach French, had been at Christ the King only 6 years, and had no master's degree (A. 20; Tr. 48). Poole was certified in Latin and Greek as well as French, had been at Christ the King for 11 years, and had a master's degree (A. 20; Tr. 15-16, 48). Gordon suggested that Poole take a sabbatical, become certified in Spanish, and return for the 1976-77 school year. Kirwan offered Poole a compromise along the terms suggested, but Poole rejected it. (A. 20-21; Tr. 50-51, 84-85.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on these facts, the Board concluded that Poole's union activity was an important factor in the decision terminate him rather than Nicole Fabien, and that his discharge violated Sections 8(a)(3) and (1) of the Act. The Board ordered the Association and the Roman Catholic Diocese of Brooklyn to cease and desist from discharging employees for engaging in union activities and from "in any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act." Respondent was affirmatively ordered to offer Joseph Poole full reinstatement and to make him whole for any loss he sustained as a result of his discharge (A. 22-23). ^{4/}

^{4/} Although Respondent has reinstated teacher Poole and has compensated him for any loss he may have suffered, this case is not moot. N.L.R.B. v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261, 271 (1938); Shore v. Building & Construction Trades Council, 173 F. 2d 678, 682 (C.A. 3, 1949); Independent Employees' Ass'n v. N.L.R.B., 158 F. 2d 448, 456 (C.A. 2, 1946), cert. denied, 333 U.S. 826 (1948). The Board's order imposes a continuing obligation, and the Board is entitled to have any repetition of the unfair labor practice barred by an enforcement decree. N.L.R.B. v. Raytheon Co., 398 U.S. 25, 27 (1970); N.L.R.B. v. Mexia Textile Mills, 339 U.S. 563, 567-68 (1950).

ARGUMENT

SUBSTANTIAL EVIDENCE ON THE RECORD
AS A WHOLE SUPPORTS THE BOARD'S
FINDING THAT RESPONDENT VIOLATED
SECTIONS 8(a)(3) AND (1) OF THE ACT
BY DISCHARGING EMPLOYEE POOLE

Sections 8(a)(3) and (1) of the Act prohibit layoffs or discharges motivated by an employee's exercise of the right "to self-organization, to form, join or assist labor organizations" guaranteed and protected by Section 7 of the Act. Even when there exists a valid ground for discharge, such as economic necessity or poor work performance, a discharge is unlawful if motivated even in part by an employee's union activities. N.L.R.B. Advance Business Forms Corp., 474 F. 2d 457, 464-65 (C.A. 2, 1973); United Aircraft Corp. v. N.L.R.B., 440 F. 2d 85, 91-92 (C.A. 2, 1971); N.L.R.B. v. Gladding Keystone Corp., 435 F. 2d 129, 131 (C.A. 2, 1970). Ascertaining an employer's motive is within the province of the Board and its determination "cannot lightly be overturned" by a reviewing Court. Advanced Business Forms, *supra*, 474 F.2d at 464; United Aircraft Corp. v. N.L.R.B., *supra*, 440 F. 2d at 93. The Court "may not displace the Board's choice between two fairly conflicting views even though the Court would justifiably have made a different choice had the matter been before it de novo." N.L.R.B. v. Walton Mfg. Co., 369 U.S. 404, 405 (1962).

The critical question in the instant case is whether the decision to discharge Poole rather than Fabien was based in part on Poole's union activities (Tr. 71-72). ^{5/} The decision was made at an administrative meeting chaired by Principal Kirwan and attended by Sister Gray who, as head of the language department, recommended Poole's discharge. Although all who attended the meeting were asked to read the records and evaluations of the teachers involved (Tr. 80, 101), Sister Gray's recommendation carried great weight because she and her assistant department chairman, who concurred in her recommendation, were the only ones who had actually observed Poole and Fabien teach (Tr. 31, 100-01). Furthermore, as Kirwan testified, he normally accepted the advice of the department chairman (Tr. 31, 100, 102, 107).

Although both Poole and Fabien were considered good teachers. (A. 21-22; Tr. 31, 80-81, 96, 104, 142, 173), Poole had taught at the school for 11 years, was certified in French, Latin and Greek, and had a masters degree, while Fabien had been at the school only six years and had no certification or master's degree.

^{5/} In is undisputed that the reduction of faculty at Christ the King was based on valid economic considerations (Tr. 71).

for the decision to terminate Poole - Kirwan and Gray - both knew that Poole had engaged in union activities (A. 17, 20; Tr. 47-48) and that Fabien had neither participated in the strike nor joined the Union (A. 19; Tr. 171-72). Moreover, Poole's union activities had brought him into direct conflict with Kirwan and Gray. Both Kirwan and Gray had demonstrated hostility toward Poole's union activity in conversations with Union Vice-President Gordon. Sister Gray's and Kirwan's statements to Gordon establish "beyond a doubt" that Poole's union activity was a motivating factor in their decision to terminate him (See p. 6, supra, A. 15, 19, 20; Tr. 52-53, 47-48). ^{6/}

The Association contends that hostility toward Poole's union activity was not a motivating factor in its decision to terminate him. The Association denies that either Kirwan or Gray expressed hostility toward Poole's union activity to Gordon, and, thus, asks this Court to over turn the credibility findings of the Administrative Law Judge and the Board.

^{6/} On at least three other occasions Kirwan demonstrated a general hostility toward union activity, saying he was "sick and tired of grievances" (Tr. 64-66). In addition, discussing a grievance in November 1973, Kirwan reminded Gordon that he was coming up for tenure and "that this kind of thing [the grievances] could not continue, that all that union business was my fault and that he would see to it that I was not there the preceeding year" (Tr. 52). Gordon filed an unfair labor practice charge concerning this threat (Tr. 68). Gordon was subsequently granted tenure and withdrew the charge (Ibid.).

This Court has held that "questions of credibility are for the trier fact" and that the resolution of credibility will not be overturned unless the credited testimony is "hopelessly incredible" on its face or "flatly contradicts either a so-called 'law of nature' or undisputed documentary testimony." N.L.R.B. v. Dinion Coil Co., 201 F.2d 484, 490 (C.A. 2, 1952). Accord, N.L.R.B. v. Columbia University, 541 F.2d 922, 928 (CA. 2, 1976); N.L.R.B. v. Warrensburg Board & Paper Corp., 340 F.2d 920, 922 (C.A. 2, 1965). The Administrative Law Judge's careful resolution of the conflicting testimony cannot be faulted, for the credited testimony was neither inherently implausible nor contrary to documentary evidence.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter judgment enforcing its order in full.

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CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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Dated at Washington, D. C.

this 24th day of February, 1977.